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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-6219

THOMAS BALDASAR, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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Petitioner, Thomas Baldasar, prays that a Writ of Certiorari be issued to the Illinois Appellate Court, Second District for review of the judgment of that Court in this case. (Opinion Appendix A. 1).

A. OPINION BELOW

The opinion of the Illinois Appellate Court, with one judge dissenting, is reported at 52 Ill.App.3d 305, 367 N.E.2d 459 and is attached as Appendix A. The Illinois Supreme Court denied the timely Petition for Leave to Appeal in an unreported order, attached as Appendix B.

B. STATEMENT OF JURISDICTION

(i) The petition is timely filed within ninety days of the Illinois Supreme Court's November 23, 1977 order denying the Petition

for Leave to Appeal.

(ii) There has been no petition for rehearing or request for an extension of time within which to petition for certiorari.

(iii) Jurisdiction is conferred by Title 28 U.S. Code, §1257(3).

C. QUESTION PRESENTED FOR REVIEW

Whether The Sixth Amendment As Interpreted In Argersinger v. Hamlin, 407 U.S. 25 (1972), and Burgett v. Texas, 398 U.S. 109 (1967), Prohibits The Use Of A Prior Uncounselled Misdemeanor Conviction To Increase A Sentence Of Imprisonment Under An Enhanced Penalty Statute?

D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

Amendment XIV to the Constitution of the United States provides in pertinent part:

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The enhanced penalty provision found in Ill.Rev.Stat., 1973, Ch. 38, par. 16-1(e)(1), provides:

> (e) Sentence.
>
> (1) Theft of property, other than a firearm, not from the person and not exceeding $150 in value is a Class A misdemeanor. A second or subsequent offense after a conviction of any type of theft, including retail theft, other than theft of a firearm, is a Class 4 felony.

The sentencing provision for misdemeanors found in Ill.Rev.Stat., 1975, Ch. 38, §1005-8-3(a)(1), provides in pertinent part:

> (a) A sentence of imprisonment for a misdemeanor shall be for a determinate term according to the following limitations:
>
> (1) for a Class A misdemeanor, for any term less than one year ...

The sentencing provisions for felonies found in Ill.Rev.Stat., 1975, Ch. 38, §1005-8-1(b)(5), and (c)(5), provides in pertinent part:

> (b)(5) for a Class 4 felony, the maximum term shall be any term in excess of one year not exceeding three years.
>
> (c)(5) for a Class 4 felony, the minimum term shall be one year in all cases.

E. STATEMENT OF THE CASE

The instant case was tried in August, 1976 on an information charging petitioner with the offense of theft of one "Dial Massage" having a value less than $150. The information also alleged that this was the defendant's second conviction for theft, thereby allowing the offense to be prosecuted as a felony rather than a misdemeanor under the enhanced penalty provisions of the Criminal Code. (Ill.Rev.Stat., 1973, Ch. 38, par. 16-1(e)(1).)

At trial the State introduced evidence of petitioner's earlier May, 1975 misdemeanor theft conviction for which he received a one year term of probation and a $150 fine. The record is clear that petitioner was not represented by counsel at the prior proceedings. (R. 55). Because of this deficiency defense counsel objected to the introduction of the uncounselled theft conviction for purposes of raising the instant offense to a felony. (R. 50-54). The trial court overruled the objection, used the counselless conviction to enhance the penalty, and sentenced petitioner to one to three years in the penitentiary. Thus, rather than face a sentence of up to 364 days (which is the maximum sentence permitted for a misdemeanor Ill.Rev.Stat., 1975, Ch. 38, §1005-8-3(a)(1)), the petitioner was sentenced to the maximum term for a Class 4 felony. (Ill.Rev.Stat., 1975, Ch. 38, §1005-8-1(b)(5) and (c)(5)). Therefore, two years of (potential) extra imprisonment were imposed as the direct result of the earlier conviction.

F. STAGE AT WHICH FEDERAL QUESTION WAS RAISED

As noted above, petitioner first raised his Sixth and Fourteenth Amendment claims in the trial court by objection to the use of the conviction obtained without counsel. (R. 50-54). By presenting this claim to the Appellate Court and to the Illinois Supreme Court in his Petition for Leave to Appeal, petitioner has pursued his constitutional claim at every stage of the proceedings.

G. REASONS FOR ALLOWANCE OF THE WRIT

THE ILLINOIS COURTS, BY PERMITTING THE USE OF INHERENTLY UNRELIABLE COUNSELLESS MISDEMEANOR CONVICTIONS TO ENHANCE SENTENCES OF IMPRISONMENT, HAVE DECIDED A SUBSTANTIAL FEDERAL QUESTION IN A MANNER WHICH CONFLICTS WITH THIS COURT'S DECISIONS ON THE RIGHT TO AND NEED FOR COUNSEL.

a.

Convictions Obtained Without Counsel's Presence Are Inherently Unreliable And For That Reason This Court Should Prohibit Their Use For Enhancement Purposes.

The requirement of counsel goes to the very integrity of the fact finding process in criminal trials. A conviction obtained after a trial in which the defendant is denied the assistance of a lawyer lacks reliability. Loper v. Beto, 405 U.S. 473, 484, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972). To assure reliability by providing a fair trial was the very rationale of Argersinger v. Hamlin, 407 U.S. 25, 42 S.Ct. 2006, 32 L.Ed.2d 530 (1972), which holds that no imprisonment may be imposed unless the accused is represented by counsel. This court reasoned that the guiding hand of counsel was necessary at every step of the proceeding. Without it, even though one was not guilty, he faced the danger of conviction because he did not know how to establish his innocence. 407 U.S. 25, 31. Here the trial and appellate court's decision erode that fundamental principle of law by allowing unreliable convictions to be used to enhance penalties.

This Court will not permit the use of an uncounselled felony conviction to "support guilt or enhance punishment for another offense ..." Burgett v. Texas, 398 U.S. 109, 115, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). Defendant Burgett was imprisoned for his prior uncounselled conviction, while the present petitioner was not. This fact, however, should not serve to distinguish the two cases for the additional fact of imprisonment in Burgett adds nothing to the reliability of the conviction. Both convictions are unreliable because of counsel's absence and it is that fact that should control. Certiorari was recently denied in a case where the Fifth Circuit held the mere fact that punishment was not imposed does not cure the conviction's unreliability:

> By dint of the serious problems associated with the prosecution of misdemeanors, the great concern in Argersinger was with the salutary contributions to be made through the presence

> of a lawyer in the courtroom representing the interests of the accused 407 U.S. at 36-37, 92 S.Ct. at 2012, 32 L.Ed.2d at 537-538. The issues that arise in misdemeanor prosecutions are often complex and beyond the usual competence of the accused. Whether a sentence of imprisonment is or is not ultimately imposed has little bearing on the complexity of those issues or the ability of the accused to defend himself in the circumstances.

Potts v. Estelle, 529 F.2d 450, 454 (5th Cir., 1976), cert. denied 22 Cr.L. 4113 (No. 77-503, Dec. 12, 1977).

Without the use of the prior conviction petitioner could only have received a sentence of less than one year. (Ill.Rev.Stat., 1973, Ch. 38, par. 16-1(3)(1).) The dissenting Appellate Court Justice's opinion takes into account the extra two years imprisonment petitioner received and summarizes the conclusion mandated by the constitution:

> ... Argersinger should be applied to invalidate prior convictions where "the direct or collateral consequences from uncounseled misdemeanor convictions relate to loss of liberty or imprisonment" ... Here, the direct consequence of the uncounseled misdemeanor conviction was an extra two years added to the defendant's maximum sentence. On this basis, it seems to me that the instant case falls within Argersinger and should be reversed and remanded for re-sentencing as a misdemeanor. (citation omitted)(emphasis original).

People v. Baldasar, 367 N.E.2d 459, 466 (2nd Dist., 1977) (Rechenmacher, P.J., dissenting). The findings of the majority are contrary to the spirit and letter of Argersinger and Burgett and should be reviewed.

b.

Resolution Of The Issue Presented Is Necessary Because The Constitution Is Being Interpreted Differently By Various Courts Resulting In Some Individuals Being Deprived Of Their Liberty For Much Greater Periods Than Others In Identical Circumstances.

A majority of the courts addressing the issue presented here or the analagous issue of whether one can be impeached by use of an uncounselled conviction have found such uses of prior counselless convictions to be unconstitutional. State v. Franklin, 337 So.2d 1152 (La.S.Ct. 1976); State v. Strange, 308 So.2d 795 (La.S.Ct. 1975); Alexander v. State, 258 Ark. 633, 527 S.W.2d 927 (1975); Maghe v. State, 507 P.2d 950 (Okla.Crim.App., 1973); State v. Kirby, 33 Ohio Misc. 48, 289 N.E.2d 406 (1972); Commonwealth v. Barrett, 322 N.E.2d 89 (Mass.App., 1975); State v. Reagan, 103 Ariz. 287, 440 P.2d 907 (1968); and Potts v. Estelle, 529 F.2d 450 (5th Cir., 1976).

The Illinois Appellate Court followed two courts that reached the

opposite conclusion. Aldrighetti v. State, 507 S.W.2d 770 (Tex.Cr.App., 1974); and State v. McGrew, 127 N.J. Super 226, 317 A.2d 390 (1974). Aldrighetti, however, like the instant case was decided by a divided panel. 507 S.W.2d 770, 773-75 (Onion, P.J., dissenting). The divergent opinion on the constitutional question presented here make this case ripe for this Court's resolution. This is especially true since petitioner received two years extra imprisonment for conduct that could not be constitutionally used to enhance his punishment in other jurisdictions.

H. CONCLUSION

For the compelling reasons stated above, petitioner requests that a writ of certiorari be allowed to resolve the substantial federal question presented.

Respectfully submitted,

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THE OPINION OF THE APPELLATE COURT OF ILLINOIS IN PEOPLE B. BALDASAR CAN BE FOUND AT PAGE 19 OF THE APPENDIX VOLUME.